85-1149

Supreme Court, U.S.
FILED
JAN 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO.

in the Supreme Court of the United States

CRAIG STEPHEN BRODKA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

WHETHER POLICE OFFICERS VIOLATED THE PETITIONER'S FOURTH AMENDMENT RIGHTS BY ENTERING THE CURTILAGE OF HIS RESIDENCE WITHOUT PRIOR JUDICIAL APPROVAL AND WITHOUT ANY SUSPICION OF WRONGDOING, WHERE THE RESIDENCE AND ITS CURTILAGE WERE NEITHER VISIBLE NOR ACCESSIBLE FROM ANY PUBLIC THROUGHFARE, AND WHERE THE PETITIONER HAD SURROUNDED HIS PROPERTY WITH TREES FOR PRIVACY, AND BY USING THE EVIDENCE OBTAINED THEREFROM TO OBTAIN A SEARCH WARRANT FOR THE RESIDENCE AND ITS CURTILAGE.

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JUDGMENT AND OPINION OF THE COURT BELOW

On October 10, 1985, the United States Court of Appeals for the Eleventh Circuit filed an opinion affirming the conviction of the Petitioner. (App. 1-5). On November 12, 1985, the Eleventh Circuit entered an order denying the timely filed Petition for Rehearing. (App. 6-7).

JURISDICTION OF THIS COURT

This Petition is filed within sixty days of November 12, 1985, when the Court of Appeals denied the Petitioner's Petition for Rehearing.

The jurisdiction of this Court is invoked pursuant to Title 28, U.S.C., Section 1254(1) and Rules 17 through 23 of this Court's rules.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment of the Constitution of the United States provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .

STATEMENT OF THE CASE

Course of Proceedings Below

Following the denial of his motion to suppress physical evidence, the petitioner entered a conditional plea of guilty pursuant to Rule 11(a)(2), Federal Rules of Criminal Procedure, preserving for review the denial of the motion.

On appeal, the Eleventh Circuit affirmed. (App. 1-5). Rehearing was denied July 15 1985. (App. 6-7)

Facts

During the execution of a search warrant in Miami, Florida, officers found an address book with the name "Craig" and a telephone number. The officers traced the number to the residence of the petitioner, Craig Brodka. Several months later, the officers decided to enter Brodka's property to investigate by posing as lost real estate agents. (App. 2).

The petitioner's residence was neither accessible nor visible from any public thoroughfare. Set in a rural area, the residence was surrounded by a horeshoe of tall, dense, holly trees which the petitioner had intentionally planted in such a fashion for privacy. Near the residence were two trailers on cement blocks which were used as extensions of the residence and for office space and storage in connection with the petitioner's nursery business. (App. 2-3).

Adjacent to the holly trees was land belonging to a neighbor which consisted of a grove surrounded by a

barbed wire fence and "no trespassing" signs. The petitioner had entered into an agreement with the neighbor to exclude strangers from that land which contained groves attractive to poachers. The neighbor's land bordered upon a public street. (App. 2-3).

In order to gain access to the petitioner's property, the officers entered the neighbor's land by way of a private roadway which led to the trees which surrounded the petitioner's residence. That roadway led to the petitioner's private dirt driveway within the trees. The officers had no permission or court order authorizing the entry upon the petitioner's land or that of his neighbor. The officers were not possessed of any knowledge that the petitioner was involved in any illegal activity. The officers entered the property on four occasions. (App. 2-3).

The First Intrusion onto Brodka's Property

The two officers first went to Brodka's residence nearly two months after they found his telephone number during the execution of an otherwise unrelated search warrant. There was no evidence that Brodka was involved in any criminal activity. (App. 2).

The officers drove an undercover vehicle and entered the dirt road on the adjacent property. They entered the petitioner's driveway and observed the residence, the two cargo containers, and a van. As the two officers exited their vehicle, one observed a male, later identified as Brodka, jumping down from the side of one container. The officer assumed Brodka had exited the container. An unidentified male drove the van away. (Brodka testified that he had not come from inside the container.

He had been in the holly trees dumping dead branches and was returning from around the side of the trailer.) (App. 2-3).

Brodka approached the officers. He was wearing work gloves, jeans, and a white shirt which, according to one of the officers, appeared to have marijuana residue sticking to the front of it. (Brodka introduced evidence tending to prove that the "residue" was actually sphagnum moss which had been sticking to his shirt. Sphagnum moss resembles marijuana and a sample was admitted into evidence.) The officers did not immediately arrest Brodka for misdemeanor possession of marijuana, although Florida law requires that misdemeanor arrests are lawful only when effected immediately or in fresh pursuit. See Section 901.15(1), Florida Statutes. (App. 3).

The officers concealed their true identities. They told Brodka that they were real estate agents searching for a piece of property. They gave the address to Brodka who indicated that such an address seemed wrong. Brodka pointed the officers in the general direction of the address. (App. 3).

The Second Intrusion

The officers left. Approximately 35 minutes later, they returned to the grove adjacent to Brodka's residence, purportedly to arrest him for misdemeanor possession of marijuana. Brodka drove a pick-up truck toward the officers and blocked them from proceeding further toward his residence. He demanded identification and their purpose for returning to the area. The officers again concealed their true identities. Brodka indicated that

he was protecting the grove against thefts. He ordered the officers to leave. The officers left and did not arrest Brodka. (App. 3).

The Third Intrusion

The officers returned a third time and proceeded to the front door of the residence, again purportedly to arrest Brodka. When they received no response to their knock on the door, they conducted a warrantless investigation of the property. They walked around the property from the front door to the driveway. They followed the driveway and walked between the two cargo containers and then to the rear of the cargo containers. Then they walked a small area between the barrier of the trees and the trailer within the barrier. (App. 3).

They claimed to have detected the faint smell of marijuana which became stronger as they approached the air-conditioning unit on the north side of one of the containers near the trees. All of this occurred on the curtilage of the residence. (App. 3).

The officers left the premises and submitted their observations in an affidavit in support of a search warrant. A state judge issued a search warrant authorizing a search of Brodka's residence and the "curtilage" thereof. (App. 4).

The Fourth Intrusion

About 10:30 p.m., the officers executed the warrant, broke open the locked container and discovered bales of marijuana in one of the containers.

The Motion to Suppress

Brodka sought suppression of the marijuana on several grounds. Each of the officers' warrantless entries onto his property was challenged as illegal. Because each entry constituted a trespass upon the curtilage of the residence and was an invasion of Brodka's reasonable expectation of privacy from governmental intrusion as guaranteed by the Fourth Amendment, Brodka sought suppression of the marijuana, arguing the entries unconstitutionally tainted the search warrant.

The Ruling of the District Court

The district judge rejected the government's argument that the searches and seizures were justifiable under the "open fields" doctrine, holding that the curtilage of Brodka's residence included the entire area within the horeshoe of trees. The district judge further held that the third entry was violative of the Fourth Amendment and all evidence obtained therefrom was excludable. However, the motion to suppress was denied, upon a finding that without the evidence from the third entry, the affidavit in support of the search warrant nevertheless set forth sufficient probable cause for its issuance.

Pursuant to Rule 11(a)(2), Federal Rules of Criminal Procedure, the petitioner entered a plea of guilty, preserving for review the denial of the motion to suppress. On December 18, 1984, he was sentenced to a term of imprisonment of two years. Notice of appeal was filed on December 18, 1984.

On October 10, 1985, the Eleventh Circuit entered an opinion affirming the decision of the district court on the ground that there was probable cause to support issuance of the warrant to search Brodka's residence. The crux of the decision is the following paragraph:

> This Court need not consider whether the entire area within the holly tree boundary did indeed constitute the curtilage of Broka's [sic] residence, because without reference to information obtained on the third visit, the affidavit contained sufficient facts upon which to base a finding of probable cause. Brodka's name and phone number had been discovered in an address book found at the scene of a marijuana trafficking operation. At the time of their first visit to Brodka's residence, Detectives Miller and Smith lawfully entered the property for the purpose of asking Brodka questions regarding the discovery of his name and phone number. Before they could speak to Brodka, however, they observed loading activity around the trailers that aroused their suspicions and watched a van pull away rapidly upon their approach. When the officers spoke to Brodka, he had just exited the rear of the trailer, and his clothes were covered by a green leafy substance that appeared to the officers to be marijuana. Brodka exhibited nervousness and trembling while speaking with the officers. Based on these facts appearing in their affidavit, we agree with the district court that there was probable cause sufficient to support issuance of the search warrant.

(App. 4-5). (The appeals court chose not to base its affirmance upon the good-faith doctrine, see *United States v. Leon*, ____ U.S. ____, 104 S.Ct. 3405 (1984), because the district court chose not to deny the motion to suppress on that basis.)

The petitioner timely sought rehearing in the Eleventh Circuit, primarily on the ground that although the appellate court properly treated as illegal the third entry by the officers, the court incorrectly assumed, without addressing the petitioner's challenge to the contrary, that the first entry upon his property was legal.

REASONS FOR GRANTING THE WRIT

This case is indicative of the need for resolution of the important issues surrounding police entries upon the curtilage of one's home, which questions were left open in *Oliver v. United States*, 446 U.S. ____, 104 S.Ct. 1735 (1984), and its companion case, *Maine v. Thornton*, 446 U.S. ____, 104 S.Ct. 1735 (1984).

Oliver and *Thornton* found no Fourth Amendment violations where the police entries were upon open fields, as opposed to curtilage. But the Court distinguished "curtilage" from "open fields" by holding that Fourth Amendment protections apply to the former:

> The historical underpinnings of the "open fields" doctrine also demonstrate that the doctrine is consistent with respect for "reasonable expectations of privacy." As Justice Holmes, writing for the Court, observed . . . the common law distinguished "open fields"

> from the "curtilage," the land immediately surrounding and associated with the home. . . . The distinction implies that only the curtilage, not the neighboring open fields, warrants the Fourth Amendment protections that attach to the home. At common law, the curtilage is the area to which extends the intimate activity associated with the "sanctity of a man's home and the privacies of life," *Boyd v. United States*, 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746 (1886), and therefore has been considered part of home itself for Fourth Amendment purposes. Thus, courts have extended Fourth Amendment protection to the curtilage; and they have defined the curtilage, as did the common law, by reference to the factors that determined whether an individual reasonably may expect that an area immediately adjacent to the home will remain private. See, *e.g.*, *United States v. van Dyke*, 643 F.2d 992, 993-994 (CA4 1981); *United States v. Williams*, 581 F.2d 451, 453 (CA5 1978); *Care v. United States*, 231 F.2d 22, 25 (CA10), *cert. denied*, 351 U.S. 932, 76 S.Ct. 788, 100 L.Ed. 1461 (1956).

104 S.Ct. at 1742.

Despite this apparent clear language, the curtilage of Brodka's residence was treated as an "open field", subject to entry by police officers possessed of no suspicion of wrongdoing. This case squarely presents the issue not present in *Oliver* and *Thornton*, namely, to what extent is Fourth Amendment protection to be afforded activities conducted in or near the home which

are conducted not in open fields but on the curtilage of the home?

There is no authority cited in the lower courts and none known to the petitioner in support of the proposition that police can enter private residential property without a warrant, probable cause, or reasonable suspicion of criminal activity, where the property exhibits a subjective and objective expectation of privacy from intrusion by the government or anyone else.

In this case, the Eleventh Circuit has issued a stamp of judicial approval to warrantless entries into private, secured, secluded residential property based upon nothing more than mere suspicion. *United States v. van Dyke*, 643 F.2d 992 (4th Cir. 1980), held a police entry as violative of the Fourth Amendment where it was not onto "open fields" or property otherwise "open" to the public or exhibiting no reasonable expectation of privacy. In *Oliver*, *van Dyke* was cited with approval. It appears doubtful that this Court anticipated that the Eleventh Circuit would align itself against *van Dyke* and *Oliver*.

The implications of this case are grave. The Fourth Amendment is supposed to protect against unlawful governmental intrusions such as those in the case at bar.

CONCLUSION

The Petitioner requests that certiorari review be granted, that his conviction be reversed, and that the charge be dismissed.

Respectfully submitted,

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Appendix

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-5010
Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CRAIG STEPHEN BRODKA,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(October 10, 1985)

Before RONEY, HENDERSON and HATCHETT, Circuit Judges.

PER CURIAM:

Following the denial of his motion to suppress evidence, Craig Stephen Brodka entered a conditional plea of guilty pursuant to Fed. R. Crim. P. 11(a)(2) to one count of possession of marijuana with intent to distribute in violation of 18 U.S.C.A. §841(a)(l). Brodka appeals, contending the search warrant pursuant to which 2,300 pounds of marijuana were discovered on his property was based on illegally obtained information. We affirm.

In the course of a May 1984 search of a Miami warehouse which uncovered quantities of drugs and documentary evidence of an extensive marijuana trafficking operation, officers discovered an address book containing the name "Craig" and a telephone number. Officers determined that the number was listed to defendant Brodka. On the afternoon of July 24, 1984, two Metropolitan-Dade County detectives, Smith and Miller, went to Brodka's residence to question him. Brodka lived off a dirt road on property measuring approximately 200 feet by 300 feet. Except for an opening on the west side, the property was surrounded by a windbreak of holly trees. Access to the property was afforded by a private driveway which passed through a neighboring mango grove. In addition to Brodka's residence, two 8-foot by 40-foot Seatrain trailers were located on the property. The trailers lay approximately 50 feet from Brodka's residence and 20 feet from each other, with a netting covering the space between the trailers.

Detectives Smith and Miller visited the Brodka property three separate times during the afternoon of July 24. On the first occasion, the detectives parked in the driveway, left their car, and began walking up the drive. They observed a van parked next to one of the trailers. One person, who turned out to be Brodka, jumped from the rear of the trailer and approached the detectives, while a second person hastily drove the van away. When Brodka intercepted the detectives, they were 20 to 25 feet inside the property. The detectives told Brodka they were real estate agents looking for a local address. Brodka told them that his property was not the address they were seeking and ordered them to leave, which they did. During this short conversation, the detectives noticed what appeared to be marijuana residue on Brodka's shirt. They observed that Brodka was "extremely nervous" and "visibly trembling" while giving them directions.

Approximately 35 minutes later, the detectives returned to the area. Brodka and two unidentified persons intercepted them in the mango grove before they reached his property and blocked them with a pickup truck. Again, the detectives left.

When the detectives returned a third time, this time to arrest Brodka, they knocked on the front door of his residence. No one answered the door. Rather than leaving, they circled the area inside of the holly trees, walking around the two cargo containers. In the course of doing so, they discovered an air conditioning unit emanating the odor of marijuana from inside the trailer.

Detectives Miller and Smith prepared an affidavit incorporating the above facts. Relying on the affidavit, a state circuit judge issued a warrant to search the trailers. When officers executed the warrant, they found 55 bales co[illegible], 2300 pounds of marijuana inside one of the tr[illegible].

Indicted under the federal statute, Brodka moved to suppress the marijuana in federal district court. The court conducted a hearing and visited the property in question. Holding that the entire area within the holly tree boundary constituted the curtilage of Brodka's residence, the court ruled the officers violated the Fourth Amendment in the course of their third visit to the Brodka property. Following *United States v. Farese*, 612 F.2d 1376 (5th Cir. 1980), the district court then purged from the affidavit all references to the third visit, considered the remainder of the affidavit, concluded that the affidavit still contained sufficient facts to furnish a basis for probable cause, and denied Brodka's motion to suppress.

[illegible]

This decision of the district court is due to be affirmed. This Court need not consider whether the entire area within the holly tree boundary did indeed constitute the curtilage of Brodka's residence, because without reference to information obtained on the third visit, the affidavit contained sufficient facts upon which to base a finding of probable cause. Brodka's name and phone number had been discovered in an address book found at the scene of a marijuana trafficking operation. At the time of their first visit to Brodka's residence, Detectives Miller and Smith lawfully entered the property for the purpose of asking Brodka questions regarding the discovery of his name and phone number. Before

they could speak to Brodka, however, they observed loading activity around the trailers that aroused their suspicions and watched a van pull away rapidly upon their approach. When the officers spoke to Brodka, he had just exited the rear of the trailer, and his clothes were covered by a green leafy substance that appeared to the officers to be marijuana. Brodka exhibited nervousness and trembling while speaking with the officers. Based on these facts appearing in their affidavit, we agree with the district court that there was probable cause sufficient to support issuance of the search warrant.

As an alternative ground for affirmance, the Government argues the motion to suppress could have been denied under the "good faith exception" provided in *United States v. Leon*, ____ U.S. ____, 104 S.Ct. 3405 (1984). Although this may have been a valid reason for denying the motion to suppress, because the district court did not base its decision on the "good faith exception," neither do we.

AFFIRMED.

[ENTERED NOV 12 1985]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-5010

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CRAIG STEPHEN BRODKA,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING

(NOVEMBER 12, 1985)

BEFORE: RONEY, HENDERSON and HATCHETT, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by appellant, Craig Stephen Brodka is denied.

ENTERED FOR THE COURT:

/s/ Paul H. Roney

United States Circuit Judge